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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

BOBBY REED MAGBY,

Petitioner-Appellant

vs.

DONALD WAWRZASZEK, and
ATTORNEY GENERAL OF THE
STATE OF ARIZONA,

Respondents-Appellees

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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QUESTION PRESENTED FOR REVIEW

Is the involuntariness issue decided by the Ninth Circuit Court of Appeals squarely before the Court for purposes of review?

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ARGUMENT I.

THE INVOLUNTARINESS ISSUE DECIDED BY THE NINTH CIRCUIT COURT OF APPEALS IS SQUARELY BEFORE THE COURT FOR PURPOSES OF REVIEW.

It would appear that the respondent has failed to review the statement of the case as stated in the initial writ papers, and thereby has not presented the true facts to this Court. Respondent, in an apparent confessionary reluctance in its haste and paucity, has intentionally failed to address the issues clearly raised by the Ninth Circuit Court of Appeals and by Magby on his Writ of Certiorari to this Court. Magby has furthered his appellate remedies by squarely dealing with the involuntariness issue of his statements to his probation officer as the sole issue decided by the Ninth Circuit Court of Appeals on December 5, 1988, and as attached in the initial writ

papers as "Appendix 1". In fact, respondent makes absolutely no mention of the Ninth Circuit Court of Appeals opinion in its response. It would appear that respondent has elected not to respond to the involuntariness issue, but, rather, has improperly suggested that the issue is not ripe for consideration by this Court. Respondent has repeatedly taken this position throughout the lower courts, notwithstanding that the Ninth Circuit Court of Appeals in its opinion on the merits of petitioner's argument, has explicitly and/or impliedly rejected respondent's argument.

The statement of the case presented in the initial papers demonstrate that Magby properly preserved the issue of an involuntary statement made to his probation officer at the trial level. The issue was not raised on the original state appeal, but was brought to the

attention of the District Court of Arizona on a Writ of Habeas Corpus to that court in conjunction with several other issues. The District Court stated as a footnote to its opinion:

> The Petition for Writ of Habeas Corpus suggests an issue not raised in the state proceedings. The papers imply that statements made by Magby to a probation officer and to a psychiatrist may have been involuntary. Cf. United States v. Bernett, 495 F.2d 943, 948-49 (D.C. Cir. 1974) (relationship between Miranda and voluntariness issues). Evidentiary use of involuntary admissions contravene the Fifth Amendment, and arguably can never constitute harmless error. See C. Wright, Fed.Prac.Pro.: Criminal §855. Petitioner's reply memorandum disclaims any intent to raise this issue, however. Cf. Gonzales v. Stone, 546 F.2d 807 (9th Cir. 1976) (federal court cannot address the merits of any issue until the available state remedies are

> exhausted as to every issue in the petition). Therefore, the court will not assess the procedural or substantive implications of this issue.

It was clear that the District Court of Arizona would not consider the issue of involuntariness of Magby's statements until Magby had exhausted his state remedies. It is this very issue that is now before this Honorable Court which Magby seeks for review.

Magby, in an attempt to expedite the issue, and hopefully resolve the matter without proceeding through the long, cumbersome state route, sought to have the Ninth Circuit Court of Appeals consider this new appellate issue at the same time the Ninth Circuit Court of Appeals was reviewing Magby's other issues raised in his habeas corpus petition. The Ninth Circuit Court of Appeals, without really specifically considering the new issue, affirmed the District

Court, and subsequently this Honorable Court summarily denied Magby's Writ of Certiorari.

Magby, following the advice of the District Court of Arizona, pursued his remedies in state court. He filed a Petition for Post-Conviction Relief, which was denied by the trial court, who affirmed that the issue had been preserved at the trial level. A Petition for Review was filed in the Arizona Supreme Court, and was summarily denied on March 31, 1981.

Magby returned to the District Court of Arizona, raising the involuntariness issue, and requested an evidentiary hearing and oral argument, as he had in the state court, but which he was with exception not afforded. (Magby was afforded oral argument in the state trial court on this issue.) The District Court, although previously encouraging Magby to revisit the court after having exhausted his

state remedies, took a different tack on this occasion, and ruled that Magby had procedurally defaulted, and was barred from seeking review of his claim because he had not really raised the issue at the state trial level. The state trial court, however, contrary to the District Court, clearly indicated the issue had been raised. The District Court acknowledged the state court's position, but nevertheless held that the state ruling had been in error, and that the state court was not knowledgeable in the subject, and did not realize that it had actually not considered the issue at trial. Respondent quickly jumped on this bandwagon, and has continually vigorously pursued the waiver argument, much as it is in this Court.

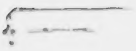
Magby appealed the District Court ruling to the Ninth Circuit Court of Appeals, and, after oral argument, the Ninth Circuit Court of

Appeals overruled the District Court and remanded the case to the District Court of Arizona to now consider the merits of Magby's involuntary statements to his probation officer. Magby v. Wawrzaszek, 741 F.2d 240 (9th Cir. 1984).

Judge Pregerson, on behalf of the Ninth Circuit Court of Appeals, stated:

> We express no opinion on the merits of Magby's involuntariness contention because we think the District Court should address the issue in the first instance. In considering Magby's second petition, the District Court thought Magby had procedurally defaulted. We disagree. In rejecting Magby's second round of post-conviction motions, the Arizona courts found, and our review of the record confirms, that Magby's counsel did raise the involuntariness issue at trial. See, e.g., State v. Magby, No. A-24765, slip op. at 2 (Pima County Super. Ct. Sept. 25, 1974) (Minute Entry denying Motion in Limine):

See also State v. Magby, No. A-24765, slip op. at 1 (Pima County Super. Ct. Dec. 23, 1980) (Minute Entry denying post-conviction relief). Given the particular facts that this case presents, we see no reason to reject the Arizona courts' determination that Magby did, after all, properly raise the issue during the original state court proceedings. Therefore, the District Court should have entertained the involuntariness claim on the merits. We reverse and remand for this purpose. On remand, the District Court should consider Magby's claim in light of the Supreme Court's recent decision in Minnesota v. Murphy, 104 S.Ct. 1136 (1984). Murphy held that a probationer who confesses to a crime during a non-custodial meeting with his probation officer is considered to have done so voluntarily unless he takes the initiative to assert his Fifth Amendment privilege. After Murphy, the privilege is not self-executing, and the parole officer is under no obligation either to remind



> the probationer of the privilege or to administer Miranda warnings. Without expressing an opinion on Murphy's affect, if any, on Magby's case, we note that Magby's probation officer -- unlike the officer in Murphy -- did question the probationer in a custodial setting.

Clearly, the Ninth Circuit Court of Appeals wanted the District Court to afford Magby a full and plenary hearing on the merits, in light of this Court's then recent decision in Minnesota v. Murphy, 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984).

The District Court of Arizona then conducted an evidentiary hearing (testimony and new exhibits and evidence was received) and permitted oral argument. Magby waited approximately two and a half years for a decision from the District Court of Arizona, which ultimately decided Magby's statements were not involuntarily made to

his probation officer while in custody, and, if they were, they were not harmful to his case.

Magby revisited the Ninth Circuit Court of Appeals, and in his opening brief addressed the involuntariness claim. Respondent then raised the issues of harmless error and the law of the case, which were completely replied to by Magby in a subsequent brief. In fact, extremely lengthy briefs were submitted by Magby on all of these issues, with adequate and supporting law for his position to the Ninth Circuit Court of Appeals. The Ninth Circuit Court of Appeals finally, for the first time, confronted the involuntariness issue head on, and decided Magby's statements to his probation officer while in custody were not made involuntarily. The Ninth Circuit Court of Appeals did not address the harmless error issue, or the law of the case argument, but decided only the issue of

involuntariness. It is this issue that Magby seeks review on this writ. The Court of Appeals indicated they were considering the question de novo, as can this Court on review.

Respondent presents no citation of law or authority to this Court for his position, only his conclusionary words that are not borne out by the record and the clear intention of the Ninth Circuit Court of Appeals opinion. It is evident from the present state of the record that the Ninth Circuit Court of Appeals is the first court to address Magby's claim of involuntariness in light of Minnesota v. Murphy, supra. Magby has offered new evidence and exhibits which support his claim that his statements while in custody were involuntarily made to his probation officer. Mincey v. Arizona, 437 U.S. 385, 95 S.Ct. 2408, 37 L.Ed.2d 290 (1978); Lynumn v. Illinois, 372 U.S. 528, 83 S.Ct.

917, 9 L.Ed.2d 922 (1963); Payne v. Arkansas, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975 (1958); Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); Davis v. North Carolina, 384 U.S. 737, 86 S.Ct. 1761, 16 L.Ed.2d 895 (1966); Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969); United States v. Tingle, 658 F.2d 1332 (9th Cir. 1981); New Jersey v. Portash, 440 U.S. 450, 99 S.Ct. 1292, 59 L.Ed.2d 501 (1979). It has also been held that the doctrine of the law of the case is a voluntary limitation. Lathan v. Brinegar, 506 F.2d 677 (9th Cir. 1974); United States v. Fullard-Leo, 156 F.2d 756 (9th Cir. 1946); United States v. Imperial Irrigation District, 559 F.2d 509 (9th Cir. 1977); Bryant v. Yellen, 447 U.S. 352, 100 S.Ct. 2232, 65 L.Ed.2d 184 (1980). No court thus far has addressed the harmless nature of the involuntariness of the statements.

The questions heretofore have dealt with the harmless error regarding the Miranda violations. Further, additional arguments not heretofore made to the Arizona Supreme Court regarding the testimony of psychiatrists and the questions on the pretrial hearings regarding competency and on a motion to suppress the statements have now been made available in argument. Further, as indicated, an evidentiary hearing was held wherein Magby, who did not testify at his trial, now testified in the District Court. Therefore, since the law of the case deals with the same court, the same case, and the same issues, and new issues, evidentiary matters, exhibits and arguments have been presented to the District Court, the law of the case is not applicable to the case at bar. Clearly, the United States Court of Appeals of the Ninth Circuit would not have remanded the case to the District Court if it had

concluded that the law of the case made the issue of involuntariness moot. United States v. Robinson, 690 F.2d 869 (11th Cir. 1982). Assuming arguendo the law of the case is applicable, this Court can depart from such legal pronouncements when the circumstances of the case warrant. United States v. Fernandez, 506 F.2d 1200 (2nd Cir. 1974). When a material change in the evidence or relevant circumstances has occurred, the law of the case would not be applicable. United States v. Estrada-Lucas, 651 F.2d 1261 (9th Cir. 1980). In the case at bar, any adherence to the doctrine of the law of the case would clearly work a manifest injustice to Magby. Arizona v. California, 460 U.S. 605, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983); Cruz-Sanchez v. Rivera-Cordero, 728 F.2d 1531 (1st Cir. 1984).

Respondent, in his concern for paper, has elected not to deal with

the merits of Magby's involuntariness argument and the decision of the Ninth Circuit Court of Appeals. Respondent's refusal to recognize the opinion cannot be countenanced as legal argument, but only legal strategy, and, therefore, those who live by the sword must die by the sword. Magby requests that his statements made to his probation officer while in custody be declared involuntary because of the respondent's failure to address this issue.

Magby is not raising the Miranda issue, as this issue has been decided and considered to be harmless error. However, the involuntariness question has, for the first time, been decided by the United States Court of Appeals for the Ninth Circuit. The harmfulness of the statement need not be reached until this Court has decided that the statements made by Magby to his probation officer while in custody

were involuntary.

Respondent reluctantly admits "that a more detailed factual backdrop" has occurred in the District Court permitting review, but accuses Magby of slanting the evidence. Respondent has not taken the time and effort to enlighten this Court wherein it has disagreement, but presumably desires this Court to ferret out this information. Respondent considers the Ninth Circuit Court's factual conclusions "objective" because it agrees with its position. Magby has specifically addressed all these issues in his opening writ, and truly makes the involuntariness issue ripe for review in this case. Magby has presented the total facts in light of Minnesota v. Murphy, supra. Magby is not aware of any case thus far that has decided the question posed by this Court in Minnesota v. Murphy, supra -- whether Murphy's statements to his probation officer

would have been voluntary if he had been in a custodial situation. This is the precise issue to be decided in this case. Magby asserts that because he was in custody, and because of a previous probationary status, and consequent no-bond status on his potential violation of probation, the trial court requirement to cooperate with the probation officer or face revocation and further incarceration, and many other factors, including, but not limited to, his mental and physical status at the time of the statement, and lack of Miranda rights, this case cries out for review by this Court. The question of whether a statement or confession obtained from a probationer by his probation officer while in custody is involuntary must finally be resolved. While respondent perceives this question and the resolving of this issue favorably to Magby to be a "hollow victory", Magby views it

quite to the contrary. This "pyrrhic" victory would resolve the battle that Magby has valiantly fought through the system for the past 15 years. If the statements are involuntary, they would not be harmless, as argued extensively by Magby in his briefs before the Ninth Circuit Court of Appeals. This Court can declare the statements involuntary, and remand the matter to the Ninth Circuit Court of Appeals for a determination on the harmful error question. In the alternative, this Honorable Court can decide the harmful error issue, sua sponte, after addressing the involuntariness question. (And require further briefing.)

A Magby victory on the involuntariness question may be "hollow" for respondent, but it is filled to capacity with all the ingredients of due process and traditional notions of fair play and justice for Magby. This "hollow victory" is what Magby

has dreamed about in his prison cell for the last 15 years -- an opportunity to right the wrong that allowed improper, unfair, and unconstitutional evidence to be used against him to obtain a conviction.

Respondent's papers are those typically filed by the state in an attempt to avoid having to deal with the merits of the writ and the Court of Appeals opinion. Magby could not assail the Court of Appeals opinion on harmful error because it never considered this issue. Respondent has elected to make a vague sound of arguing harmful error without any support in law and fact. Respondent has suggested that, if this Court will not accept its vagaries, then it will be forced to address the merits. Respondent is not the screening authority in this forum, and, if it chooses to forego argument on the merits, it must be considered waived. The "no factual concessions" by design is only one

of the many caveats and exemptions claimed by respondent for its inadequate response. Respondent has had ample time in which to address the arguments posed, particularly since it received Magby's writ on February 3, 1989.

CONCLUSION

Magby humbly requests this Honorable Court declare his statements to his probation officer while in custody involuntary, and remand this matter to the Ninth Circuit Court of Appeals on the issue of harmful error, or, in the alternative, declare the statements involuntary and harmful, and grant Magby's writ allowing for a new trial.

Respectfully submitted this 16th day of May, 1989.

Stanton Bloom
Attorney for
Petitioner-Appellant

AFFIDAVIT OF SERVICE

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

STANTON BLOOM, being first duly sworn, deposes and says:

That in accordance with Rule 33(2)(a), Supreme Court Rules, he has served two copies of the following documents on the Attorney General, State of Arizona, 200 State Capital Building, Phoenix, Arizona, 85007, and has forwarded by mail, three copies of the following documents to the Solicitor General, Department of Justice, Washington, D.C., on this 16th day of May, 1989.

Stanton Bloom
STANTON BLOOM

SUBSCRIBED and SWORN TO before me this 16th day of May, 1989, by STANTON BLOOM.

Janice L. de la Vina
Notary Public

My Commission Expires: 8-17-90